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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CITY OF IMPERIAL, Plaintiff and Appellant, v. FERGUSON ENTERPRISES, INC. et al., Defendant and Respondent.	D072737 (Super. Ct. No. 37-2014-00015675-CU-BC-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, John S. Meyer, Judge. Affirmed.

Niddrie Addams Fuller Singh, David A. Niddrie, John S. Addams; Wingert Grebing Brubaker & Juskie, Stephen C. Grebing, Andrew A. Servais and Mallory Holt for Plaintiff and Appellant.

DeSimone & Huxster, Gerald DeSimone; Ferguson Case Orr Paterson and Wendy C. Lascher for Defendant and Respondent Ferguson Enterprises, Inc.

The City of Imperial (the City) appeals following a jury trial in its lawsuit against Ferguson Enterprises, Inc. (Ferguson) in which it sought to recover damages resulting from a contract under which Ferguson provided the City with a defective automatic water meter reading system (AMR system) manufactured by Datamatic, Ltd. (Datamatic). In special verdict forms, the jury made findings establishing that Ferguson and Datamatic were liable to the City, but on the issue of damages, the jury was not asked to distinguish between the amount of damages for which Ferguson was responsible and the amount of damages for which Datamatic was responsible. Instead, the special verdict form simply specified the City's "total damages," and then broke down the cost of the AMR system by breaking down the cost of "product" and the cost of "installation."

It was Ferguson's position throughout the litigation that because of a contractual provision in the transactional documents that limited its liability to the City, Ferguson was legally responsible to the City only for damages associated with the cost of installing the AMR system, but not for any damages relating to Datamatic's defective products. When, at the conclusion of trial, the parties could not agree on the amount of damages against Ferguson that the trial court should specify in a judgment based on the special verdict forms, the parties agreed that the trial court should simply enter a judgment which stated that "[j]udgment shall be according to the Special Verdict[]," which was attached to the judgment.

After expressly "reserv[ing] all rights to posttrial motions," Ferguson brought a motion to set aside, vacate or modify the judgment or alternatively for partial judgment notwithstanding the verdict, in which it sought to have the trial court modify the

judgment to clarify that Ferguson was liable only for the damages associated with the cost of installation of the AMR system. The trial court granted Ferguson's motion and entered a modified judgment, which specified that Ferguson was liable for damages associated with installation of the AMR system in the amount of $626,232.50 (based on the amount corresponding to the installation-related damages specified in the special verdict form) but did not award any damages based on the cost of the Datamatic products themselves. The trial court later awarded prejudgment interest against Ferguson, but it denied the City's motion for an award of attorney fees against Ferguson.

The City challenges the trial court's ruling modifying the judgment to limit the award of damages against Ferguson to those associated with the installation of the AMR system. Specifically, the City argues that (1) the trial court's ruling was procedurally improper because it invaded the province of the jury, which specified the City's damages in the special verdict form; and (2) for several reasons, the contractual provision limiting Ferguson's liability to the City does not prevent an award of damages against Ferguson that includes damages relating to the products comprising the AMR system. The City also contends that the trial court abused its discretion in denying its motion for an award of attorney fees. We conclude that the City's arguments lack merit, and we accordingly affirm the judgment.

I.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Ferguson Installs a Defective AMR System for the City*

The City supplies potable water to its residents, with the amount of the water bills based on the water use recorded on water meters installed at each residence. The City entered into an agreement with Ferguson—one of the world's largest suppliers of water equipment—to install an AMR system that would allow the City to (1) remotely read each residential water meter, and (2) remotely shut off water to each residence through newly-installed remote shut off valves (RSVs). The City determined that the installation of the new system would save time and money because City employees would no longer be required to manually collect readings from water meters each month, and it would allow the City to more efficiently serve residents who needed their water to be turned on or off.

The AMR system that Ferguson installed for the City was comprised of components manufactured by Datamatic, consisting mainly of approximately (1) 4500 separate electronic units, known as "Firefly" units, that were installed at each residence to remotely communicate water meter data to the City; and (2) and 3600 RSVs to allow the City to remotely shut off water at each separate residence.

Ferguson and the City entered into a contract for the supply and installation of the AMR system and RSVs in September 2010 at a price of over $2 million. The price to be

paid to Ferguson included the cost for the components manufactured by Datamatic, as well as $506,650 for professional installation services to be provided by Ferguson.

To memorialize the transaction, the City and Ferguson signed an Installation Services Agreement (Agreement).[1] As relevant here, the Agreement sets forth the scope of the warranties that Ferguson (Seller) provided to the City (Buyer) in connection with its supply and installation of the AMR System.

Under the heading "Installation Warranty," the Agreement stated:

> "For those goods installed by Seller, for a period of one (1) year from installation or first occupancy by end user (whichever occurs later and in no event longer than eighteen (18) months from date of installation), Seller warrants that services performed by Seller hereunder shall be provided in a professional and workmanlike manner and in full compliance with local code. Upon receipt of notice from Buyer that installation services were not performed in accordance with the limited warranty herein, Seller shall re-perform the services. This Installation Warranty does not apply if there is evidence of abuse, acts of God or misuse by Buyer or a third party."

Under the heading "Product Warranty," the Agreement set forth a liability disclaimer (the liability disclaimer):

> "The manufacturer[']s warranty shall be made available to Buyer or end user. Seller shall coordinate manufacturer warranty service with the end user at the Buyer's request. The sole warranty applicable to installation service provided (as applicable) is delineated as Installation Warranty (see above). Product warranties are from the respective manufacturer. With respect to the underlying products, THE BUYER'S SOLE AND EXCLUSIVE WARRANTY IS THAT PROVIDED BY THE PRODUCT'S MANUFACTURER. SELLER HEREBY DISCLAIMS ALL EXPRESSED OR IMPLIED WARRANTIES, WHETHER IMPLIED BY OPERATION OF LAW OR OTHERWISE, INCLUDING, WITHOUT LIMITATION, ALL IMPLIED WARRANTIES OF

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1 The parties' agreement also included a separate document titled "Scope of Work" which described the AMR System.

> MERCHANTABILITY AND FITNESS OR FITNESS FOR A PARTICULAR PURPOSE. UNDER NO CIRCUMSTANCES, AND IN NO EVENT, WILL SELLER BE LIABLE FOR PERSONAL INJURY OR PROPERTY DAMAGE OR ANY OTHER LOSS, DAMAGE, COST OF REPAIRS OR INCIDENTAL, PUNITIVE, SPECIAL OR CONSEQUENTIAL DAMAGES RELATED TO THE UNDERLYING PRODUCTS PROVIDED. The manufacturer's warranty and service obligations shall be for the benefit of the Buyer or end user."[2]

Ferguson also supplied the City with a copy of the Datamatic product warranty that set forth a manufacturer's warranty for the Firefly units, which covered defects in materials and workmanship and guaranteed 10 years of battery life. Datamatic also warranted the remaining components of the AMR system for one year. In addition, Datamatic directly entered into a contract with the City, in which Datamatic agreed to license its software to the City, among other things.

Ferguson began installing the AMR system in early 2011, and the installation was substantially complete by September 2011. Ferguson subcontracted the installation work to a separate company, Concord Environmental Energy, Inc. (Concord). Several problems arose during the installation. Among other things, certain Firefly units were installed at the wrong addresses so that residents received bills for someone else's water usage, referred to as "misassociated" Firefly units. Also, water leaks were created during the installation, along with other problems caused by sloppy work. Concord was

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[2] We will refer to the relevant contents of this paragraph, collectively, as "the liability disclaimer." However, in so doing, we note that it contains two main substantive portions, which we will sometimes refer to individually. These two portions are (1) an exclusion of all warranties, express or implied, related to Datamatic's products (the warranty exclusion); (2) a disclaimer of all liability for any loss or damage, including consequential damages, relating to Datamatic's products (the consequential damages disclaimer).

eventually terminated by Ferguson at the City's request, and the City took over the remaining installation of the AMR system.

During testing of the system, problems quickly developed with the RSVs because certain valves would shut off and not come back on, leaving some residents without water. The City was also not satisfied with the response time required before the RSVs reacted to commands. The problem with the unwanted shutoffs of the RSVs was not solved, and the City eventually had to cut wires to make the RSVs inoperative.

By September 2011, problems also had developed with the Firefly units, in that many of them had stopped remotely communicating data so that the City had to manually read the data from the non-reporting meters. By November 2012, 813 Firefly units were not reporting any data. Ultimately, by the end of 2012, the problem was traced to Firefly units manufactured for Datamatic in Malaysia. The circuit boards from the Malaysian factory were improperly glued, allowing water intrusion and causing a short circuit. Eighty-four percent of the Firefly units installed in the City were manufactured in Malaysia.

Apparently due to financial problems, Datamatic began cutting off contact with the City in October 2012, and it eventually ceased operations and stopped manufacturing Firefly units.[3] Until it pulled out of the project, Datamatic was honoring its warranty by

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[3] The parties stipulated in the trial court that Datamatic filed for Chapter 7 bankruptcy in September 2013, that the bankruptcy case was closed in 2015, and that the City was pursuing this lawsuit against Datamatic solely to obtain any available insurance coverage from Datamatic's insurer. However, the jury did not learn of Datamatic's bankruptcy, and instead was informed only that Datamatic ceased operations.

repairing or replacing the City's defective Firefly units. For a short period after Datamatic left the project, Ferguson attempted to refurbish the defective Firefly units for the City,[4] but then it too stopped doing so.

As of April 2014, only 1200 Firefly units were reporting data, and the City was required to perform manual readings of approximately 2500 water meters. With so many Firefly units not reporting and Ferguson not providing any solution to the City that did not require the City to spend additional monies, the City stopped using the Ferguson-supplied AMR system in May 2014. The City ultimately paid another company approximately $1 million to install a functioning AMR system.

B. *The City's Lawsuit Against Ferguson and Datamatic*

The City filed a lawsuit against Ferguson and Datamatic alleging several different causes of action for damages incurred by the City due to the failure of the AMR system installed by Ferguson.[5] The operative Fourth Amended Complaint alleged causes of action against Ferguson for breach of contract, negligent misrepresentation, strict products liability, breach of express warranty, rescission, negligence, unfair competition (Bus. & Prof. Code, § 17200). Against Datamatic, the Fourth Amended Complaint alleged causes of action for negligent misrepresentation, strict products liability, breach

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4 For example, in a November 9, 2012 e-mail, a Ferguson employee stated that Ferguson was now certified to do warranty repair work for Datamatic, and it planned to replace all non-reporting Firefly units in the City's system, with the goal of achieving 98.5 percent of meters reporting.

5 Ferguson filed a cross-complaint, which as to the City alleged a single cause of action for declaratory relief concerning Ferguson's entitlement to an award of attorney fees in the event the court eventually determined Ferguson was the prevailing party.

of express warranty, and negligence. At trial, the City sought to recover from both Datamatic and Ferguson the entire price of the AMR system as well as other costs incurred by the City in connection with the system, which the City contended amounted to $3,892,839.

One question that arose at the beginning of trial was the extent to which the jury would hear evidence and argument about the liability disclaimer in Ferguson's contract with the City. The City filed a motion in limine requesting that Ferguson be precluded from offering testimony and argument to the jury on that issue. The City proposed that, instead, the trial court should determine the enforceability of the contractual provisions disclaiming Ferguson's liability "following the jury trial." Ferguson agreed that there were "questions of law for the court to address" regarding the enforceability of the liability disclaimer provisions in its contract with the City, but it argued that "the court's ruling should be done prior to the jury commencing any deliberations." During the in limine hearing, the trial court deferred ruling on the motion, indicating that, based on the evidence presented at trial, it would "decide before the end of the trial whether that provision is unenforceable or enforceable" and would instruct the jury accordingly. Later during trial, the City prompted the trial court to make a ruling at the close of evidence on the enforceability of the liability disclaimer in Ferguson's contract with the City by filing a written pleading requesting that the court instruct the jury that the disclaimer was unenforceable. While discussing jury instructions with counsel at the close of evidence, the trial court rejected the City's request for the jury instruction, ruling that the liability disclaimer was enforceable to bar any contractual liability of Ferguson related to the

products manufactured by Datamatic. The trial court stated, "I think it is enforceable as to the product. It's limited."

During trial, Ferguson and Datamatic both filed motions for nonsuit on the cause of action for strict products liability, which the trial court granted. Ferguson also brought a motion for a directed verdict on the causes of action for breach of contract, negligent misrepresentation and breach of express warranty, and Datamatic brought a motion for directed verdict on the causes of action for negligence and negligent misrepresentation. The only cause of action on which the trial court granted a directed verdict was the cause of action for breach of express warranty against Ferguson.

In six special verdict forms, the jury was asked to make factual findings on the elements pertaining to the causes of action for breach of contract, negligent misrepresentation and negligence as to Ferguson, and the causes of action for breach of express warranty, negligent misrepresentation and negligence as to Datamatic. In the special verdict forms the jury made findings on the elements necessary to establish (1) Ferguson's liability for breach of contract and negligence, and (2) Datamatic's liability for negligence.[6] On the special verdict form pertaining to negligence, the jury was asked

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[6] The special verdict form relating to the cause of action for negligent misrepresentation against Datamatic was improperly drafted, so that the jury was not directed to answer all of the necessary questions to establish the elements of negligent misrepresentation.

to specify the "percentage of responsibility" for the City's harm attributable to Datamatic, Ferguson, and Concord.[7] Ferguson was found to be 35 percent responsible.[8]

The sixth special verdict form concerned "Damages." The jury completed the special verdict form as follows:

> "1. What are the CITY OF IMPERIAL's total damages? Do not reduce the damages based on the fault, if any, of the CITY OF IMPERIAL or others.
>
> "a. Cost of the AMR System:
>
> Product: $ 1,538,709
> Installation: $ 626,232.5[0]
>
> "b. Labor expense relating to install, troubleshoot, repair and removal of system: $ 236,566
>
> "c. Property Damage: $ 0
>
> "d. Administrative expense incurred by CITY OF IMPERIAL: $ 401,051.75
>
> "e. Costs associated with misallocations:[9] $ 0"

Counsel for Ferguson argued to the jury in closing that it should not award any amount against Ferguson related to the cost of the products manufactured by Datamatic based on the liability disclaimer in the Agreement. However, the special verdict form

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7 Concord was named as a defendant in the lawsuit, but settled with the City prior to trial.

8 Even though it took a different position in the trial court, on appeal the City does not attempt to argue that it should have been awarded any additional damages against Ferguson based on the jury's findings on the negligence cause of action.

9 The term "misallocation" may be an attempt to refer to the "misassociation" of the Fireflys, when they were installed at the wrong address. The City's damages expert used the term "misallocation" instead of "misassociation."

was not designed in such a way to *enable* the jury to make that determination. Instead, the special verdict form on damages simply asked about the City's "total damages" collectively pertaining to Datamatic and Ferguson.

After the jury returned its special verdicts, the trial court directed counsel for the City to prepare a proposed judgment. The City proposed a judgment indicating the joint and several liability of Datamatic and Ferguson in the total amount of $2,802,559.25. Ferguson objected in a pleading lodged with the trial court, which took the position that the liability disclaimer in its contract with the City precluded Ferguson from being held liable for the damages associated with the cost of the product manufactured by Datamatic. At Ferguson's request, the cost associated with Datamatic's product ($1,538,709) and the cost associated with Ferguson's installation of the AMR system ($626,232.50) had been assigned separate line items in the special verdict form, and Ferguson contended that the judgment should reflect its liability only for the amount that the jury found to be attributable to the installation of the AMR system.

After an unreported telephone conference with the parties, the trial court instructed the City to prepare a new proposed judgment. Apparently unable to come to an agreement on the amount of damages that the judgment should award with respect to Ferguson, the parties agreed that the trial court should simply enter judgment *that attached the special verdict forms and said nothing further about the amount of Ferguson's liability*. The trial court was expressly informed that counsel for Ferguson "reserve[d] all rights to posttrial motions." The trial court accordingly entered a judgment (the original judgment) that did nothing more than state that "[j]udgment shall

be entered according to the Special Verdict attached hereto as Exhibit 'A'," and attached the six special verdict forms.

Ferguson then filed a motion to set aside, vacate, or modify the original judgment and enter another and different judgment or to clarify judgment or, in the alternative, for a partial judgment notwithstanding the verdict. As the procedural basis for the motion, Ferguson cited (1) Code of Civil Procedure section 663, which gives the court authority to set aside and vacate a judgment based on a special verdict or decision by the court and enter a different judgment under certain circumstances; and (2) Code of Civil Procedure section 629, which gives the trial court authority to enter a judgment notwithstanding the verdict. Ferguson argued that based on the special verdict forms alone, the original judgment was unclear as to the amount of Ferguson's liability. It contended that the trial court should accordingly set aside the original judgment and enter a new judgment specifying the amount of Ferguson's liability, taking into account the trial court's previous ruling that the liability disclaimer in Ferguson's contract with the City was enforceable. Ferguson explained, "The instant motion does not seek to have the court change the amount of damages. It merely requests the court to clarify the damages attributable to the respective defendants, in light of the court's previous . . . orders *and* the actual categorization of the damages between the actual product and the installation." (Capitalization omitted.)

After considering the parties' briefing and holding a hearing, the trial court granted the relief requested by Ferguson, citing Code of Civil Procedure section 663. The trial court entered a modified judgment awarding damages in the following amount:

> "(1) $626,232.50 for installation damages only against Ferguson Enterprises Inc. Labor and administrative expenses are consequential damages and the contract excludes recovery of consequential damages; and
>
> "(2) $2,802,559.25 against Defendant Datamatic, Ltd, which includes the total cost of the AMR System, as well as labor and administrative expenses proximately caused by the negligence in the sum of $236,566 and $401,051.75 respectively."

The City filed a motion seeking an award of attorney fees against Ferguson pursuant to [Civil Code] section 1717. The City also sought an award of prejudgment interest. The trial court awarded prejudgment interest against Ferguson in the amount of $430,056.73, but it denied the attorney fees motion, concluding that no party prevailed in the breach of contract cause of action against Ferguson.

The City appeals from the judgment against Ferguson, arguing that the trial court improperly limited the damages against Ferguson to those associated with the installation of the AMR system and that the trial court improperly declined to award attorney fees against Ferguson.

II.

DISCUSSION

A. *The City's Challenge to the Modified Judgment Against Ferguson Lacks Merit*

1. *The Trial Court's Entry of a Modified Judgment Was Procedurally Proper and Did Not Invade the Province of the Jury*

In its first challenge to the trial court's entry of a modified judgment as to Ferguson, the City argues the modified judgment was procedurally improper under Code of Civil Procedure section 663. According to the City, although Code of Civil Procedure section 663 authorizes a trial court to modify a judgment that was "not consistent with or

not supported by the special verdict" (Code Civ. Proc., § 663, subd. (2)), the original judgment here was "wholly consistent with" and supported by the jury's special verdict. Thus, according to the City, the trial court did not have authority under Code of Civil Procedure section 663 to modify the judgment, and the trial court improperly "inva[ded] the province of the jury."

Section 663 provides as follows:

> "A judgment or decree, when based upon a decision by the court, or the special verdict of a jury, may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered, for either of the following causes, materially affecting the substantial rights of the party and entitling the party to a different judgment:
>
> "1. Incorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts; and in such case when the judgment is set aside, the statement of decision shall be amended and corrected.
>
> "2. A judgment or decree not consistent with or not supported by the special verdict." (Code Civ. Proc., § 663.)

In its minute order granting Ferguson's motion to set aside, vacate or modify the judgment, the trial court quoted the portion of the statute allowing relief based on "a judgment or decree not consistent with or not supported by the special verdict." (Code Civ. Proc., § 663, subd. (2).) The trial court stated that it was granting the motion for the purpose of "clarifying the damages attributable to the respective defendants."[10]

In arguing that a modification pursuant to Code of Civil Procedure section 663 was improper because there was no ground to conclude that the original judgment was

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10 Ferguson's motion to set aside, vacate or modify the judgment did not focus on any specific part of Code of Civil Procedure section 663.

"not consistent with or not supported by the special verdict" (Code Civ. Proc., § 663, subd. (2)) the City's fundamental assumption is that the jury's special verdict unambiguously awarded $2,802,559.25 in damages *against Ferguson* comprising all of the damages incurred by the City associated with the AMR system. The City argues that "the jury's intent was clear" to award the full amount of $2,802,559.25 against Ferguson. The City contends that the jury's intent was made clear by the fact that "[t]he jury could have denied [the City] any so-called product-related damages as requested by Ferguson. It did not." Therefore, according to the City, it was "wholly consistent" with the special verdict for the original judgment to award $2,802,559.25 in damages against Ferguson, and it was improper for the trial court to modify the judgment to a different amount that reflected only damages associated with the installation of the AMR system.

The City's argument fails because it depends on a mischaracterization of both the special verdict and the original judgment. As we have explained, the special verdict form did not ask the jury to make any findings regarding the damages for which Ferguson *alone* was liable. Instead, the special verdict simply asked the jury to set forth the City's "total damages" associated with the AMR system, which were then broken down into subcategories, including the costs attributable to "installation" of the AMR system. Although counsel for Ferguson had argued to the jury that the liability disclaimer in Ferguson's contract with the City meant that the jury should not award any damages against Ferguson for the cost of the AMR system, as opposed to the costs of installation, the special verdict form did not give the jury the opportunity to make a finding on that issue because it did not separately ask about damages against Ferguson and damages

against Datamatic. Therefore, contrary to the City's characterization, the special verdict does not specify that Ferguson is liable for $2,802,559.25 in damages and does not specify whether, due to the liability disclaimer in Ferguson's contract with the City, Ferguson should be liable only for those damages associated with the installation of the system.

In addition to arguing that the modification of the judgment invaded the province of the jury, the City separately contends that in this case Code of Civil Procedure section 663 did not give the trial court the authority to modify the original judgment. As we will explain, we disagree.

Based on the procedural history we have detailed, there is no question that the original judgment, in the form entered by the trial court, was fundamentally flawed and needed to be corrected because the trial court did not follow the proper procedure for entering judgment following a jury trial in which a special verdict is used. Unlike a general verdict, a special verdict is not designed to stand alone as a finding on a defendant's liability. "The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant; a special verdict is that by which the jury find the facts only, leaving the judgment to the Court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law." (Code Civ. Proc., § 624.)

Here, the jury was asked to return numerous findings of fact on six special verdict forms. Although the special verdict made many factual findings as to the elements relating to the different causes of action and the amount of damages incurred by the City in different categories of harm, it did not, on its face, contain any legal conclusions about the liability of Ferguson and Datamatic with respect to any specific cause of action or with respect to the damages for which each party was legally liable. Using the special verdict *as starting point*, it was necessary for the trial court to take the jury's findings of fact and, *applying the operative legal principles*, to reach conclusions of law about the liability of Ferguson and Datamatic. Here, however, in entering the original judgment the trial court failed to follow that approach. Instead of carrying out its duty to "draw . . . conclusions of law" based on the jury's findings of fact, the trial court simply attached the special verdict forms to the judgment and stated that "[j]udgment shall be entered according to the Special Verdict attached hereto . . . ." That approach resulted in an incomplete and unintelligible judgment because it did not specify the causes of action on which the City had prevailed and did not specify the amount of damages for which Ferguson and Datamatic were separately liable.[11]

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[11] In its reply brief, the City represents that "[d]uring trial, Ferguson asked the jury to decide (1) whether it breached the contract with [the City], (2) if so, what damages resulted from a breach, and (3) whether its warranty disclaimer limited damages." This characterization is not accurate because the special verdict forms did *not* ask the jury to decide *any* of those issues. As to the issue of whether Ferguson breached its contract with the City, the jury was simply asked to make factual findings corresponding to the necessary elements for breach of contract. It was the role of the trial court, following the special verdict, to apply those factual findings to draw the legal conclusion that Ferguson breached its contract with the City. Similarly, as to what damages resulted from

Although no provision in the Code of Civil Procedure is expressly designed to provide a remedy for the unique problem with the original judgment that was created by the trial court here, Code of Civil Procedure section 663 appears to be the most appropriate provision for Ferguson to have cited in seeking to clarify the judgment. Section 663 allows the entry of a modified judgment when a judgment is "not consistent with or not supported by the special verdict." (Code Civ. Proc., § 663, subd. (2).) Here, the original judgment was not "supported by" the special verdict because the special verdict itself did not make any of the necessary conclusions of law. Put another way, the special verdict could not "support" *any* judgment in and of itself because it did not specify the causes of action on which the City prevailed, and it did not set forth the amount of damages for which Ferguson and Datamatic were liable. The trial court was required to make its own conclusions of law based on the facts found by the jury. It failed to do so in the original judgment, but it properly remedied that error by vacating the original judgment and entering a modified judgment.

"[W]hen a party brings a timely posttrial motion, the trial court has broad discretion to determine the relief being requested." (*Shapiro v. Prudential Property &*

Ferguson's breach and whether the liability disclaimer limited damages, it was the role of the trial court to apply the factual findings of the jury concerning damages to the applicable legal principles to determine the amount of Ferguson's liability. The jury simply made no finding that, in itself, established Ferguson's liability to the City for breach of contract. Therefore, contrary to the City's contention, Ferguson did not ask the trial court to "change the jury's factual findings on damages." Further, although the City points out that certain jury instructions implied that the jury would be deciding which damages were properly awarded against Ferguson, and the jury was given instructions that provided guidance in making that determination, the special verdict form did not give the jury an opportunity to isolate a damages award as to Ferguson.

Casualty Co. (1997) 52 Cal.App.4th 722, 727.) Here, as the trial court indicated in its order granting Ferguson's motion, it understood that by the manner in which it had entered the original judgment, it had created a situation in which the parties required clarification regarding "the damages attributable to the respective defendants." Having so understood the relief sought by Ferguson, the trial court had the authority to remedy its error in entering the original judgment and to enter a modified judgment that followed the proper procedures for entry of a judgment following a special verdict. In so doing, the trial court clarified the amount of damages for which Ferguson and Datamatic were liable.[12]

2. *The Trial Court Properly Enforced the Liability Disclaimer in Ferguson's Contract with the City*

The City presents a series of arguments aimed at establishing that the liability disclaimer in the Agreement should not have been applied to preclude Ferguson's liability for the damages relating to Datamatic's defective products, either because the liability

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12 In a footnote to its opening brief, the City asserts that "any *error* in the verdict form was invited" by Ferguson. Although the opening brief's argument is not well developed, we understand the City to be claiming that Ferguson was estopped from asking the trial court to modify the judgment because Ferguson agreed to the content of the special verdict forms. In its reply brief, the City takes a different approach to its invited error argument, in which it contends that Ferguson "was precluded from taking advantage of any error it caused by *requesting* the jury instructions." Both iterations of the invited error argument fail because the problem with the original judgment that required correction in a modified judgment was not caused by the content of the special verdict forms or by the jury instructions. On the contrary, the error arose when the trial court improperly entered judgment by simply attaching the special verdict forms to the original judgment.

disclaimer does not apply to the breach of contract cause of action or because it is not enforceable.

As a preliminary matter, before considering each of the City's arguments, we pause to set forth the legal principles that the parties agree are applicable to the Agreement's liability disclaimer. The parties agree that the Agreement is a contract for the sale of goods covered by the California Uniform Commercial Code.[13] The California Uniform Commercial Code allows parties to exclude or modify all express or implied warranties. (Cal. U. Com. Code, § 2316.) In this case, the liability disclaimer in the Agreement contains a warranty exclusion that comprehensively excludes any express or implied warranties with respect to Datamatic's products and expressly limits the warranty provided by Ferguson to its installation services.[14]

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13 The division of the California Uniform Commercial Code pertaining to a sale of goods applies if the essence of the agreement pertains to the provision of goods rather than services. (*Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1186 ["In determining whether the agreement was for the sale of goods or the provision of services, ' "we must look to the 'essence' of the agreement." ' "].) As the parties both assume that the sales division of the California Uniform Commercial Code applies and do not dispute that the essence of the Agreement pertains to the provision of goods, we accept the parties' characterization and do not further consider the issue.

14 To be enforceable, certain warranty exclusions must be conspicuous. (Cal. U. Com. Code, § 2316, subd. (2).) The City does not attempt to argue that the warranty exclusion in the Agreement is invalid on that ground. The relevant language is as follows: "With respect to the underlying products, THE BUYER'S SOLE AND EXCLUSIVE WARRANTY IS THAT PROVIDED BY THE PRODUCT'S MANUFACTURER. SELLER HEREBY DISCLAIMS ALL EXPRESSED OR IMPLIED WARRANTIES, WHETHER IMPLIED BY OPERATION OF LAW OR OTHERWISE, INCLUDING, WITHOUT LIMITATION, ALL IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS OR FITNESS FOR A PARTICULAR PURPOSE."

Further, although the code describes the remedies that are available to a buyer when a breach of contract for a sale of goods occurs (Cal. U. Com. Code, §§ 2711-2715), it also allows the parties to enter into an agreement to limit the remedies that will be available. The applicable provision allowing a limitation of remedies is California Uniform Commercial Code section 2719:

> "(1) Subject to the provisions of subdivisions (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,
>
> "(a) The agreement may provide for remedies in addition to or in substitution for those provided in this division and may limit or alter the measure of damages recoverable under this division, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and
>
> "(b) Resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.
>
> "(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this code.
>
> "(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is invalid unless it is proved that the limitation is not unconscionable. Limitation of consequential damages where the loss is commercial is valid unless it is

proved that the limitation is unconscionable." (Cal. U. Com. Code, § 2719.)[15]

Here, the Agreement contains two substantive provisions relevant to this code provision.

First, in conformance with the provision that an "agreement may provide for remedies in addition to or in substitution for those provided in this division and may limit or alter the measure of damages recoverable under this division, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts" (Cal. U. Com. Code, § 2719, subd. (1)(a)), the installation warranty in the Agreement states that as a remedy for installation not performed by Ferguson in a professional and workmanlike manner, the remedy shall be a re-performance of those services by Ferguson.[16] However, the Agreement contains no limited or exclusive remedy from Ferguson pertaining to any defective product. There is

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15 Except for the last sentence of subdivision (3), California Uniform Commercial Code section 2719 is based on section 2-719 of the Uniform Commercial Code (UCC). (U. Com. Code, § 2-719.) As explained in Official Comment 1 to section 2-719 of the UCC: "Under this section parties are left free to shape their remedies to their particular requirements and reasonable agreements limiting or modifying remedies are to be given effect.' [¶] However, it is of the very essence of a sales contract that *at least minimum adequate remedies be available*. . . . Thus any clause purporting to modify or limit the remedial provisions of this Article in an unconscionable manner is subject to deletion and in that event the remedies made available by this Article are applicable as if the stricken clause had never existed. Similarly . . . where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Article." (Official Comment 1, UCC, § 2-719, italics added.)

16 It is arguable that the Agreement does not include language making the re-performance of the installation work the *exclusive* remedy for breach of the installation warranty. We note the issue, but we need not resolve it for the purposes of our analysis.

no limited remedy in the Agreement for the *breach* of any warranty on the products because Ferguson expressly disclaimed any warranty for Datamatic's products.

Second, in conformance with the provision that "[c]onsequential damages may be limited or excluded unless the limitation or exclusion is unconscionable" (Cal. U. Com. Code, § 2719, subd. (3)), the Agreement states "IN NO EVENT, WILL SELLER BE LIABLE FOR PERSONAL INJURY OR PROPERTY DAMAGE OR ANY OTHER LOSS, DAMAGE, COST OF REPAIRS OR INCIDENTAL, PUNITIVE, SPECIAL OR CONSEQUENTIAL DAMAGES RELATED TO THE UNDERLYING PRODUCTS PROVIDED." As this case does not concern a consumer goods transaction, to disqualify the consequential damages disclaimer in the Agreement it is the City's burden to prove that the disclaimer is unconscionable. (Cal. U. Com. Code, § 2719, subd. (3) ["Limitation of consequential damages where the loss is commercial is valid unless it is proved that the limitation is unconscionable."].) As we understand the City's position, it has not undertaken to establish that the consequential damages disclaimer is unconscionable. Instead, the City makes a series of alternate arguments in an attempt to establish that the Agreement's liability disclaimer should not have been applied by the trial court to limit the damages available in the breach of contract to those associated with the cost of installation of the AMR system. We now turn to those arguments.

a. *The Liability Disclaimer Applies Even Though Ferguson Did Not Deliver an Operative AMR System*

The City contends that the liability disclaimer should not apply because Ferguson promised not only to supply and install a product, but also to deliver an " 'excellent system' " and "a system that worked."[17] The City asserts because Ferguson promised an operational system, the City may recover damages caused by defects in Datamatic's products under a breach of contract theory despite the liability disclaimer.[18] In essence, the City's view is that a failure of *the AMR system* is different from a failure of *Datamatic's products*, and thus the liability disclaimer should not apply.

This argument improperly attempts to separate the AMR system from the products comprising it. In making this distinction, the City necessarily contends that even though the parties agreed that Ferguson was not warranting the Datamatic products against any product defects, and even though the parties agreed Ferguson would have no liability relating to the products themselves, the parties nevertheless agreed that if the *entire AMR system* failed because of product defects, the exclusions and disclaimers agreed to by the

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17 The promise of " 'an excellent system' " is based on a statement in the Scope of Work, which states that "Datamatic and Ferguson are committed to bringing [the City] an excellent system."

18 According to the City, "because the system did not function as the *contract required*, [the City] could properly seek damages for breach of contract against Ferguson." The City argues that because Ferguson's contractual promise was to "sell and supply [the City] with a 'good,' namely, a turn-key [AMR] system," the liability disclaimer should not apply at all, as that disclaimer relates to defects in Datamatic's products, not a failure of the entire AMR system.

parties regarding product defects would not apply. We find no support for that view in the text of the Agreement itself.

The liability disclaimer is far reaching and clear: "With respect to the underlying products, THE BUYER'S SOLE AND EXCLUSIVE WARRANTY IS THAT PROVIDED BY THE PRODUCT'S MANUFACTURER. SELLER HEREBY DISCLAIMS ALL EXPRESSED OR IMPLIED WARRANTIES, WHETHER IMPLIED BY OPERATION OF LAW OR OTHERWISE, INCLUDING, WITHOUT LIMITATION, ALL IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS OR FITNESS FOR A PARTICULAR PURPOSE. UNDER NO CIRCUMSTANCES, AND IN NO EVENT, WILL SELLER BE LIABLE FOR PERSONAL INJURY OR PROPERTY DAMAGE OR ANY OTHER LOSS, DAMAGE, COST OF REPAIRS OR INCIDENTAL, PUNITIVE, SPECIAL OR CONSEQUENTIAL DAMAGES RELATED TO THE UNDERLYING PRODUCTS PROVIDED." The parties agreed to this provision in the Agreement, and it says nothing about carving out an exception that would create liability if, as here, the underlying products provided by Datamatic failed in such a manner that the entire AMR system became useless for the purpose that the City intended. To have the meaning that the City suggests, the language quoted above would have to be interpreted as stating that although Ferguson is providing no warranty as to the Datamatic products, it is nevertheless promising that the AMR system *comprised of those products*, will be functional,

operative and free from defects. The language does not support such an interpretation.[19] Because the AMR system is comprised of Datamatic's products, if a failure of those products causes a failure of the system, the liability disclaimer applies by its clear terms.[20]

As part of the same argument, the City devotes extensive attention in its opening brief to establishing the basic and undisputed legal concept that when a defendant fails to deliver a functional product covered by a warranty, in addition to bringing a breach of warranty cause of action, a plaintiff may also bring a breach of contract cause of action.

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19 "The interpretation of a contract is a judicial function. . . . When [as here] there is no material conflict in the extrinsic evidence, the . . . court interprets the contract as a matter of law." (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1125-1126.)

20 In arguing that the liability disclaimer does not apply because the product defect was so widespread that it caused the entire system to fail, the City relies primarily on *Aqua Marine Products, Inc. v. Pathe Computer Control Systems Corp.* (N.J. Super. Ct. App. Div. 1988) 229 N.J.Super. 264. In *Aqua Marine Products* the parties contracted for delivery of computer-controlled sewing machinery that would perform a specific task, and before delivery, the parties also added a roll-feed attachment to the order so that fabric could be fed into the sewing machinery. The defendant was not able to deliver functional sewing machinery according to the contract specifications, but it was able to supply a roll-feed attachment. The court held that it was error for the trial court to conclude that there were two separate contracts, i.e., for the sewing machinery and the roll-feed attachment, and that the trial court thus should not have set off the plaintiff's recovery for breach of contract by subtracting the value of the roll-feed attachment. As the court explained, "[t]he ultimate question of whether the machine worked could not therefore be separately decided in respect of its separate components. It worked or not as a unit." (*Id*. at p. 272.) *Aqua Marine Products* is inapplicable here, as it has nothing to do with the validity of a liability disclaimer provision. Neither *Aqua Marine Products*, nor any other authority identified by the City, supports the City's contention that the liability disclaimer is inapplicable where a party disclaims liability based on a product defect, but the product defect is so significant and widespread that it causes the entire system to fail.

(See, e.g., *Webster v. Klassen* (1952) 109 Cal.App.2d 583, 591.) The City then argues that "the limitation of liability [in the Agreement] only applies to breach of warranty claims." We reject the argument, as the liability disclaimer agreed to by the parties is very broad and covers every type of cause of action that might arise from the Agreement, not just a breach of warranty claim. Specifically, the parties broadly agreed that "UNDER NO CIRCUMSTANCES, AND IN NO EVENT, WILL SELLER BE LIABLE FOR PERSONAL INJURY OR PROPERTY DAMAGE OR ANY OTHER LOSS, DAMAGE, COST OF REPAIRS OR INCIDENTAL, PUNITIVE, SPECIAL OR CONSEQUENTIAL DAMAGES RELATED TO THE UNDERLYING PRODUCTS PROVIDED." This language plainly covers damages arising in a breach of contract cause of action when those damages relate to the underlying products provided by Ferguson as part of the Agreement.

The City cites two out-of-state cases arising in a consumer context in which, despite a warranty exclusion, the plaintiff was still able to recover damages for being sold a defective product. (*Esquire Mobile Homes, Inc. v. Arrendale* (Ga. Ct. App. 1987) 182 Ga.App. 528 [356 S.E.2d 250] (*Arrendale*) [plaintiffs who bought a defective mobile home from a dealership were entitled to revoke acceptance despite a warranty exclusion]; *Murray v. D & J Motor Co., Inc.* (Okla. Civ. App. 1998) 958 P.2d 823, 827, 829 (*Murray*) [a plaintiff who purchased a defective used van from a dealer that was sold " 'as is' and 'with all faults' " where the dealer disclaimed all express and implied warranties could nevertheless revoke her purchase for nonconformity due to a "warranty of description" that the seller was providing what it represented to be selling].) We express

no view on whether the decisions relied upon by the City are a sound application of the UCC,[21] as the cases are easily distinguished. Neither involved a contractual provision disclaiming liability for damages relating to the products at issue. Instead, both cases decided that when a seller *expressly excluded all warranties* but the product ended up having product defects, the buyer nevertheless had the right to revoke acceptance because the products did not conform to the buyer's expectations. Here, however, in addition to excluding all warranties, the parties plainly and conspicuously agreed that Ferguson would not be liable for any damages relating to Datamatic's products.

In its reply brief, the City cites *PC COM, Inc. v. Proteon, Inc.* (S.D.N.Y. 1995) 906 F.Supp. 894 to argue that the consequential damages disclaimer in the Agreement does not bar recovery for Ferguson's failure to supply an operative AMR system. However, as we will explain, *PC COM* does not lend support because it does not concern

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[21] Commentators have criticized the cases as not being faithful to the provisions of the UCC that allow the parties to agree to an exclusion of warranties. As one law review article explains, the approach set forth in *Arrendale* and other cases like it "relies on a seller's implied 'representation' concerning the quality of the goods . . . which the court treats as outside the scope of the Article 2 [of the UCC] warranty rules and thus not subject to disclaimer. This tactic renders the elaborate [UCC] warranty provisions virtually meaningless since they can be finessed merely by finding an implied 'non-warranty representation.' Surely the drafters [of the UCC] did not promulgate three separate warranty-of-quality provisions . . . and a carefully crafted warranty disclaimer section . . . so courts could ignore these provisions at their whim." (Harry M. Flechtner, *Enforcing Manufacturers' Warranties, "Pass Through" Warranties, and the Like: Can the Buyer Get A Refund?* (1998) 50 Rutgers L.Rev. 397, 426 & fn. 78.) Criticizing *Murray* and similar cases, another law review article explains that "[t]he rule enunciated in the . . . line of cases fails to comport with Article 2 [of the UCC]. . . . Under Article 2, the mere fact that goods may not perform as the buyer desires does not necessarily mean that the goods fail to conform to the contract." (Timothy Davis, *UCC Breach of Warranty and Contract Claims: Clarifying the Distinction* (2009) 61 Baylor L.Rev. 783, 806-807 & fn. 129.)

a liability disclaimer *for a defective product*. Specifically, in *PC COM*, the defendant contracted to supply the plaintiff with computer network equipment to resell, but a pricing dispute arose and the defendant refused to continue to supply the equipment. (*Id*. at pp. 898-899.) The plaintiff sued for breach of contract, and on summary judgment, the defendant argued that a provision in the parties' agreement precluded any consequential damages for breach of contract, even for nondelivery of the promised product. (*Id*. at p. 902.) Applying Massachusetts law, the court concluded there was a material dispute of fact about whether the parties intended to preclude consequential damages because such a provision could leave the buyer without an adequate remedy for the seller's nonperformance. (*Id*. at pp. 902-903.) In so doing, the court expressly distinguished the circumstance where consequential damages stemmed from a breach *based on the supply of defective goods*, in which case law has allowed parties to disclaim consequential damages. (*Id*. at p. 903 ["This is not a case of defective goods, but one of nonperformance"].) Here, because the liability disclaimer in the Agreement concerned damages related to Ferguson's supply of *defective goods*, *PC COM* does not apply.

As part of its argument that the breach of contract cause of action should not be subject to the liability disclaimer, the City claims that after Datamatic left the project, the City promised in a November 2012 e-mail that it would get the AMR system to a point where 98.5 percent of the meters were accurately reporting and it would thereafter fix the problem with the RSVs. Although the argument is somewhat undeveloped, the City appears to contend that Ferguson's promise in the e-mail modified the Agreement, with the effect of negating the liability disclaimer for product defects. We disagree for two

reasons. First, the Agreement expressly states that "[t]he terms and conditions contained herein may not be added to, modified, superseded or otherwise altered except by a written modification signed by the facility manager of [Ferguson's] servicing location. All transactions shall be governed solely by the terms and conditions contained herein." The purported agreement by Ferguson to obtain 98.5 percent meter reads and to fix the problems with the RSVs was not made in a signed written modification by Ferguson's facility manager.[22] As set forth in section 2209, subdivision (2), of the California Uniform Commercial Code, "[a] signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded."[23]

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22 The statement was made in an e-mail from an employee at Ferguson, which stated, "Our plan is replace all non-reporting [Firefly units] in your system by 12/10 and have you getting meter reads above 98.5 at that time. Following this first step we will then address the RSVs."

23 The City contends that the provision in the Agreement requiring a modification to be in a signed writing is not valid because it was not separately signed by the parties. For this contention, the City apparently relies on the language in section 2209, subdivision (2), of the California Uniform Commercial Code which states, "A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party." (Cal. U. Com. Code, § 2209, subd. (2).) We are not persuaded. The Agreement between the City and Ferguson was not an agreement "between merchants." " 'Merchant' means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill." (Cal. U. Com. Code, § 2104, subds. (1) & (3).) " 'Between merchants' means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants." (Cal. U. Com. Code, § 2104, subd. (3).) The City did not deal in AMR system equipment and thus was not a "merchant."

Thus, the e-mail from Ferguson in November 2012 did not serve to modify the Agreement.[24] Second, even if the November 2012 Agreement did somehow modify the Agreement, it said nothing about deleting the liability disclaimer in the Agreement. Thus, even if Ferguson promised to get the AMR system to a point where 98.5 percent of the meters were accurately reporting and to fix the problem with the RSVs, it did not agree to forego the protection of the liability disclaimer in the Agreement.

b. *The Liability Disclaimer Applies Even Though the City Never Accepted the AMR System*

The City next argues because the AMR System was never functioning to the point that 95 percent of the meters were reporting, the AMR system was never "delivered," so that the liability disclaimer in the Agreement never went into effect. According to the City, "Ferguson could not disclaim liability until the system was turned over, rather than as soon as the products were installed." As the City contends, because only delivery and acceptance of the system could trigger a warranty, the liability disclaimer was not triggered. As we will explain, we reject the argument.

The City's contention that the AMR system was never delivered is based on the following provision in the Scope of Work: "Route turnover to City: Datamatic and Ferguson are committed to bringing [the City] an excellent system. When we reach 95% reads in a three day period we will turn each 'route' over to the city on a route to route

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24 The City incorrectly contends that "the jury impliedly found the e[-]mail established a new or modified contract." Although the jury was given an instruction relating to contract modification, the special verdict form contained no question concerning whether the parties modified the Agreement.

basis." According to the City, this provision means that the Datamatic products were not "delivered" until the AMR system as a whole was functional to the point that 95 percent of the meters were reliably responding. The Agreement does not support the City's contention. The provision that the City cites is most reasonably interpreted as a commitment by Ferguson to stay on the job of installing and troubleshooting the system until it is operating to an acceptable level of 95 percent of meters reporting over a three-day period. The evidence at trial showed that all of Datamatic's products were *delivered* to the City and installed long before the City began experiencing system failure due to the latent defects in the Datamatic Firefly units that were manufactured in Malaysia. The fact that the system never operated to the extent that 95 percent of the meters were reliably reporting does not mean that Ferguson failed to deliver and install the Datamatic products or the AMR system comprised of those products.

As another basis for its argument, the City points to the wording of the liability disclaimer, which states that the disclaimer applies to damages "related to the underlying products *provided*." (Italics added.) The City contends the products could not be "provided" until the City formally accepted the system, and that the liability disclaimer would be ineffective until that occurred. We disagree. The liability disclaimer broadly states that "UNDER NO CIRCUMSTANCES, AND IN NO EVENT" will Ferguson be liable for damages related to the underlying products provided. It is factually undisputed that the Datamatic units were physically *provided* to the City, installed and put into operation before the system started to fail. The plain language of the liability disclaimer applies to the *products* provided, and does not state that it takes effect only after the

entire AMR system has been proven to be operational on a consistent basis. Here, Ferguson "provided" the Datamatic products to the City by installing them, and that action triggered the liability disclaimer.

Next, premised on its incorrect assertion that the AMR system was not "delivered" the City cites several cases to support its contention that the liability disclaimer does not apply. The main case that the City relies upon in its opening brief is *Hawaiian Telephone Co. v. Microform Data Systems, Inc.* (9th Cir. 1987) 829 F.2d 919 (*Hawaiian Telephone*), in which the plaintiff contracted for the defendant to design and install a computerized directory system. The defendant was never able to design a satisfactory system within the applicable time parameters and thus never delivered and installed it. (*Id*. at p. 921.) The plaintiff sued for breach of contract, and the trial court awarded consequential damages for the breach. (*Id*. at pp. 921-922.) Applying California law, the Ninth Circuit affirmed the award of consequential damages despite the presence of a consequential damages disclaimer in the parties' contract. Specifically, the disclaimer in *Hawaiian Telephone* stated: " 'THE FOREGOING WARRANTIES ARE IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS, AND ARE IN LIEU OF ALL OBLIGATIONS OR LIABILITIES ON THE PART OF MICROFORM FOR ANY CLAIMS, DAMAGES OR EXPENSES OF ANY KIND, WHETHER MADE OR SUFFERED BY CUSTOMER OR ANY OTHER PERSON, INCLUDING WITHOUT LIMITATION CONSEQUENTIAL DAMAGES EVEN IF MICROFORM HAS BEEN ADVISED OF THE POSSIBILITY THEREOF.' " (*Id*. at

p. 924, fn. 4.) The " 'FOREGOING WARRANTIES' " in the disclaimer referred to a warranty "that the equipment, *when delivered and installed,* will conform to the Equipment Specifications attached hereto and will be in good working order. For sixty (60) days following the date of acceptance pursuant to paragraph 3 hereof, [defendant] warrants each item of equipment to be free from defects in material and workmanship. [¶] In the event any item of equipment does not perform as expressly warranted, [defendant's] sole obligation shall be to make necessary repairs, adjustments or replacements at no additional charge to Customer. Any major item of replacement equipment shall also be warranted for sixty (60) days from the date the replacement equipment was installed." (*Ibid.*, italics added.)

The Ninth Circuit explained that the liability disclaimer did not apply because it expressly pertained to a breach of the *repair* warranties. "By failing to deliver the system at all, however, the repair warranties were never triggered. They did not become operative and could not limit remedies to which they applied under the contract. . . . The limitation of liability for breach of the repair warranties was tied to the provision excluding consequential damages, and *both were dependent on delivery of the system*. This is not a case in which a delivered system failed to function as warranted. The system was never delivered at all." (*Hawaiian Telephone*, *supra*, 829 F.2d at p. 924, citation omitted.) The court stated, "The contractual provision at issue in this case purports to exclude liability for consequential damages when the equipment is 'delivered and installed.' The provision applies only to consequential damages sustained after a system conforming to contract specifications is in place, and it does not otherwise

foreclose an award of consequential damages. . . . Because this system was never installed, the limited repair remedy with its exclusion of consequential damages did not become applicable." (*Id*. at p. 925, citation omitted.)

Hawaiian Telephone is inapposite here because the liability disclaimer in the Agreement is not tied to the delivery and installation by Ferguson of the AMR system; nor is it tied to the availability of any warranty remedy promised by Ferguson. Indeed, the Agreement's liability disclaimer excludes all warranties relating to the Datamatic products, and it states that "UNDER NO CIRCUMSTANCES, AND IN NO EVENT" will liability arise for damages relating to the products provided.

In its reply brief, the City relies on *Leanin' Tree, Inc. v. Thiele Technologies, Inc.* (10th Cir. 2002) 43 Fed.Appx. 318, 319, an unpublished decision from the Tenth Circuit Court of Appeals, in support of its contention that the consequential damages disclaimer is not applicable because the AMR system was not "delivered." In *Leanin' Tree,* the defendant agreed to manufacture an automatic packing machine for the plaintiff but was ultimately unable to design a satisfactory machine and therefore did not deliver one. (*Id*. at p. 320.) Relying on the specific wording of the contract's liability disclaimer, the Tenth Circuit held the trial court properly awarded consequential damages to the plaintiff for breach of contract because the liability disclaimer was intended to protect the defendant seller from liability arising *after* the delivery of the product. "[W]e conclude that [the liability disclaimer] is focused on limiting [the defendant's] liability for situations *arising after delivery* of a functioning machine. Because that never occurred here, the damage limitations do not apply." (*Id.* at p. 326.) Here, in contrast, as we have

explained, the liability disclaimer contains no language suggesting that the parties intended it to take effect only after delivery.[25]

c. *The City Has Not Defeated the Liability Disclaimer by Establishing That It is Unenforceable Under California Uniform Commercial Code § 2719*

The City's next group of arguments depends on the application of California Uniform Commercial Code section 2719, which states:

> "(1) Subject to the provisions of subdivisions (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,
>
> "(a) The agreement may provide for remedies in addition to or in substitution for those provided in this division and may limit or alter the measure of damages recoverable under this division, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and
>
> "(b) Resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

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[25] In its reply brief, the City also relies upon *Consolidated Data Terminals v. Applied Digital Data Systems, Inc.* (9th Cir. 1983) 708 F.2d 385, 388 to argue that, despite a liability disclaimer, consequential damages should have been awarded. In *Consolidated Data Terminals*, the Ninth Circuit applied New York law in a lawsuit between a manufacturer of computer terminals and a distributor. (*Id*. at p. 388.) When one of the computer terminal models ended up experiencing product defects, the distributor sued the manufacturer for breach of warranty. (*Id*. at pp. 388-389.) The Ninth Circuit concluded that the contractual provision disclaiming liability "for any consequential damages, loss or expense arising in connection with the use of or the inability to use [the] products or goods for any purpose whatsoever" did not apply. (*Id*. at p. 392.) The court explained that the provision was inapplicable because it did "not exclude all consequential damages, but rather only such damages as result from loss of use of defective equipment. . . . The consequential damages suffered by [the distributor] were of a wholly different nature" as they "consisted of a loss of customer goodwill . . . , together with the expenses incurred . . . in trying to recapture that goodwill." (*Ibid*.) Here, in contrast, the liability disclaimer in the Agreement applies more broadly to any liability "RELATED TO THE UNDERLYING PRODUCTS," and the damages incurred by the City that the trial court excluded from the judgment all met that description.

> "(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this code.
>
> "(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is invalid unless it is proved that the limitation is not unconscionable. Limitation of consequential damages where the loss is commercial is valid unless it is proved that the limitation is unconscionable." (Cal. U. Com. Code, § 2719.)

The City's first argument focuses on the statutory language stating that an "agreement may provide for remedies in addition to or in substitution for those provided in this division and may limit or alter the measure of damages recoverable under this division, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts." (Cal. U. Com Code, § 2719, subd. (1)(a).) The City interprets this language to mean that an agreement *must* provide for the remedy of either "return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts." According to the City, the statute "requires" such a minimum remedy.

The statutory language does not support such an interpretation, and no California case law supports the City's contention.[26] The statute plainly provides a *permissive* opportunity for the parties to agree to provide for the limited remedy of "return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts." In this case, the parties did not agree to such a remedy in the Agreement because there was no warranty on Datamatic products provided by Ferguson in the first place.[27]

Next, the City contends that the remedy "fail[ed] of its essential purpose," relying on subdivision (2) of California Uniform Commercial Code section 2719. That provision (taken verbatim from UCC section 2-719) states that "[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as

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26 The City cites one out-of-state case relevant to its statutory interpretation, which we do not find to be persuasive. In *American Nursery Products, Inc. v. Indian Wells Orchards* (1990) 115 Wash.2d 217 [797 P.2d 477], without extensive analysis, the Washington court noted the portion of the Official Comments to the UCC, which states that "it is of the very essence of a sales contract that at least minimum adequate remedies be available." The court then concluded that "section 2-719(1)(a) and the official comment together contemplate that a replacement/refund remedy is usually a minimum adequate remedy and a fair quantum of remedy." (*Id*. at p. 255.) Nowhere does the text of the UCC (or the California Uniform Commercial Code) state that a party must provide any specific limited remedy. Instead, as dispositive here, the text provides that parties may limit all warranties (Cal. U. Com. Code, § 2316; UCC, § 2-316) and may limit all consequential damages unless the limitation is unconscionable. (Cal. U. Com. Code, § 2719; UCC, § 2-719.)

27 Under the terms of the California Uniform Commercial Code, a party may exclude all warranties, including implied warranties of merchantability and fitness. (Cal. U. Com. Code, § 2316.) In the Agreement, the parties agreed to such an exclusion on warranties as it related to Datamatic's products, and the City has set forth no reason why the warranty exclusion is unenforceable.

provided in this Act." "[T]his provision 'is not concerned with arrangements which were oppressive at their inception, but rather with the application of an agreement to novel circumstances not contemplated by the parties.' " (1 White, Summers, & Hillman, Uniform Commercial Code § 13:20 (6th ed.).) "The most frequent application of 2-719(2) occurs when under a limited 'repair and replacement' remedy, the seller is unwilling or unable to repair the defective goods within a reasonable period of time. . . . A remedy also fails when the seller is willing and able to repair but cannot perform the repairs, for example, because the goods have been destroyed." (*Ibid*.)

The City's contention is apparently that it was provided with a limited or exclusive remedy concerning the AMR system, which consisted of a warranty provided by Datamatic. Further, Datamatic was unable to fulfill its warranty obligations to repair or replace the defective Firefly units, and as a result, the City's limited or exclusive remedy of relying on Datamatic to repair or replace the defective Firefly units failed of its essential purpose.[28] According to the City, it should therefore be able to obtain all of the available statutory remedies against Ferguson despite Ferguson's liability disclaimer. The argument is flawed because it is premised solely on the failure of a limited remedy provided by *Datamatic*, not Ferguson. (See *City of New York v. Bell Helicopter Textron,*

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28 Although the argument is not well developed, the City also appears to contend that the limited remedy provided in the Agreement for the installation warranty "failed of its essential purpose." If that is the case, we reject the argument. The limited remedy with respect to the installation warranty provided for re-performance of any nonconforming installation work. At trial, the evidence showed that Ferguson worked with the City to honor its agreement to re-perform any substandard installation work. To the extent that remedy failed of its essential purpose, the City was fully compensated by the modified judgment for any damages relating to Ferguson's installation of the AMR system.

Inc. (E.D.N.Y., June 16, 2015, No. 13CV 6848) 2015 WL 3767241, at *8-9; [when a helicopter manufacturer (Bell) sold a helicopter but disclaimed all warranties and all liability relating to the engine manufactured by a different party (Pratt), the City of New York could not prevail in a breach of contract claim against Bell for damages resulting from failure of the engine even though Pratt's limited warranty on the engine might fail of its essential purpose because "[t]he possible failure of the City's repair or replacement limited remedy from Pratt does not negate Bell's valid disclaimers of liability"].) Ferguson did not provide *any remedy* with respect to product defects. Instead, it *disclaimed* all warranties or remedies concerning Datamatic's products. And, as there was never any warranty for the products given by Ferguson, there was no *limited remedy* provided in the Agreement concerning those products. With no limited remedy concerning product defects appearing in the Agreement, the City cannot establish that any such *non-existent* limited remedy "failed of its essential purpose."[29]

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29 Further, even if the City were able to identify a limited remedy specified in the Agreement and establish that the remedy failed of its essential purpose, case law interpreting UCC section 2-719 as adopted in various states suggests that doing so would not serve to negate the limitation on consequential damages that appears in the Agreement. (See, e.g., *McNally Wellman Co., a Div. of Boliden Allis, Inc. v. New York State Elec. & Gas Corp.* (2d Cir. 1995) 63 F.3d 1188, 1197 [under New York law, "a limitation on incidental or consequential damages remains valid even if an exclusive remedy fails"]; *Chatlos Systems v. National Cash Register Corp.* (3d Cir. 1980) 635 F.2d 1081, 1086-1087; *Razor v. Hyundai Motor America* (Ill. 2006) 222 Ill.2d 75, 92 [854 NE.2d 607, 618].) However, as commentators and courts have recognized, "[t]here exists a split of authority on whether subsections (2) and (3) operate independently or whether the failure of an exclusive remedy precludes enforcement of a consequential damages exclusion." (*McNally Wellman Co.*, at p. 1197.) "The issue of whether a contractual limitation on damages survives when the exclusive remedy fails in its essential purpose thrusts parties into a 'legal quagmire that has divided courts across the nation.' . . . Both

Finally, even if the adequacy of the resort to *Datamatic's* warranty was relevant in determining whether a limited remedy provided in the Agreement failed of its essential purpose, the City has not established that any remedy provided in Datamatic's warranty failed of its essential purpose. In fact, the trial court entered judgment in favor of the City against Datamatic for breach of warranty in the amount of $2,802,559.25, which is the full amount of damages found by the jury to have arisen from the City's contract to obtain the AMR system. Although the parties made vague references during posttrial motions that Datamatic's bankruptcy might make it difficult for the City to recover the

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state and federal courts are divided on the question. . . . The confusion among the decisions and the conflicting views 'stem[ ] from ambiguous, if not conflicting, provisions of [section] 2-719 of the U.C.C., and the accompanying comments.' " (*In re Enron Corp.* (Bankr. S.D.N.Y. 2007) 367 B.R. 384, 397-398, citations omitted.) The issue "still appears to be an open question in California . . . . No state case was found that addressed the issue." (*Id*. at p. 398.) Ninth Circuit cases interpreting California law have taken a case by case approach, holding that in some instances when a limited remedy fails of its essential purpose a limitation on consequential damages will become unenforceable. (See, e.g., *S.M. Wilson & Co. v. Smith Intern., Inc.* (9th Cir. 1978) 587 F.2d 1363, 1375-1376 [holding a consequential damages limitation to be enforceable after adopting a case-by-case approach in which a court should look to, among other things, whether "[p]arties of relatively equal bargaining power negotiated an allocation of their risks of loss"]; *RRX Industries, Inc. v. Lab-Con, Inc.* (9th Cir. 1985) 772 F.2d 543, 547 [following *S.M. Wilson & Co*. to conclude that, under the circumstances, the consequential damages limitation was not enforceable].) We need not, and do not, resolve the issue to decide this appeal. As we have explained, there is no limited remedy provided in the Agreement by Ferguson concerning Datamatic products that could be said to fail of its essential purpose. Therefore, we need not decide whether failure of a limited remedy serves to negate the consequential damages disclaimer.

full amount from Datamatic's insurance carrier, there is no evidence in the record to support such a finding.[30]

d. *Reliance Damages Were Not Available*

The City argues that "[e]ven if the disclaimer for consequential damages was enforceable, the jury properly awarded reliance damages."[31] The City cites a jury instruction which stated, "If you decide that Ferguson breached the contract, [the City] may recover the reasonable amount of money that it spent in preparing for contract performance. These amounts are called 'reliance damages.' "

However, the fact that the jury was instructed on reliance damages is not relevant. *After* the jury's verdict, the trial court applied the liability disclaimer to reach *conclusions of law* about the amount of damages for which Ferguson was liable. The City provides no argument as to why the reliance damages would not fall into the scope of the liability disclaimer as "ANY OTHER LOSS, DAMAGE, COST OF REPAIRS OR INCIDENTAL, PUNITIVE, SPECIAL OR CONSEQUENTIAL DAMAGES RELATED TO THE UNDERLYING PRODUCTS PROVIDED," even if the jury's finding regarding the City's total damages included those amounts.

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30 Further, we reject the City's contention that it was Ferguson's burden to prove that resort to Datamatic's warranty failed of its essential purpose because of Datamatic's bankruptcy, as the issue is whether the City has succeeded in *invalidating* the liability disclaimer.

31 Without further explanation, the City contends that all of the damages the jury awarded under the category of "[l]abor expense relating to install, troubleshoot, repair and removal of system" ($236,566), and "[a]dministrative expense incurred by [the City]" ($401,051.75), constituted reliance damages.

e. *The Liability Disclaimer Did Not Violate Public Policy*

Finally, relying on *Tunkl v. Regents of University of Cal.* (1963) 60 Cal.2d 92 (*Tunkl*), the City argues that the liability disclaimer is invalid because it violates public policy. In *Tunkl*, our Supreme Court held that an "exculpatory provision may stand only if it does not involve 'the public interest.' " (*Tunkl*, at p. 96.)[32] Specifically in considering "the validity of a release from liability for future negligence imposed as a condition for admission to a charitable research hospital," *Tunkl* held that "an agreement between a hospital and an entering patient affects the public interest and that, in consequence, the exculpatory provision included within it must be invalid." (*Id*. at p. 94.)

Tunkl set forth a list of factors constituting a "rough outline" for a court to consider in determining whether an exculpatory provision in a contract is invalid because it involves the public interest. (*Tunkl*, *supra*, 60 Cal.2d at p. 98.) "[T]he attempted but invalid exemption" will involve "a transaction which exhibits some or all of the following characteristics. It concerns a business of a type generally thought suitable for public regulation. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. As a result of the essential nature of the service, in the economic

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32 *Tunkl* relied in part on Civil Code section 1668, which provides, "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."

setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents." (*Id*. at pp. 98-101, footnotes omitted.)

The City contends that some of the *Tunkl* factors are present here because the Agreement involves the provision of a public utility—residential water service—to citizens of the City. First we note that Ferguson was not the entity that *directly* provided a public utility to citizens. Instead, Ferguson supplied equipment to the City so that the City could upgrade the equipment that the City used to provide a public utility to the City's residents. Further, by entering into the Agreement with the City, Ferguson provided an upgrade to certain features of the residential water delivery system, which provided convenience and cost-savings to the City, but the upgrade was not *required* for the City to be able to provide residential water service. However, even assuming that Ferguson was involved in the provision of a public utility *to some extent* by entering into the Agreement, the only two *Tunkl* factors that might be implicated by that circumstance are as follows: "It concerns a business of a type generally thought suitable for public regulation" and "[t]he party seeking exculpation is engaged in performing a service of

great importance to the public, which is often a matter of practical necessity for some members of the public." (*Tunkl*, *supra*, 60 Cal.2d at pp. 98-99.)

None of the other factors set forth in *Tunkl* are present here. First, Ferguson did not hold itself out "as willing to perform this service for any member of the public who seeks it" (*Tunkl*, *supra*, 60 Cal.2d at p. 99), but instead entered into a negotiated contract that enabled the City to upgrade its meter reading capabilities. Second, Ferguson did not "possess[] a decisive advantage of bargaining strength against any member of the public who seeks [its] services." (*Ibid*.) On the contrary, the City was an equal and sophisticated bargaining partner, which had its choice of other companies with which to contract for an AMR system.[33] Third, because the City was an equal bargaining partner with the ability to look out for its own interests, Ferguson did not "exercis[e] a superior bargaining power" and in so doing "confront[] the public with a standardized adhesion contract of exculpation" which "[made] no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence." (*Id*. at pp. 99-100.) Instead, the parties negotiated the terms of the Agreement through an extensive process, during which the City requested additional and different provisions than those proposed

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33 The City contends that the record shows that the AMR system offered by Ferguson was the only available option, giving Ferguson the upper hand in negotiations. The record does not support such a finding. Instead, a representative of the City testified that the City chose the Datamatic system because it was viewed to be superior, in that "[i]t supplied the kinds of equipment and the kinds of efficiencies that the City was looking for that no other system could do."

by Ferguson.[34] Finally, this is not a situation in which "as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents." (*Id*. at p. 101.) The City was involved in the process of preparing for the installation of the AMR system, demanded the removal of the subcontractor Concord from the project when that entity did not perform adequately, and, at its own insistence, took over some of the installation.

This case does not involve the kind of exculpatory contract described in *Tunkl*. As *Tunkl* explains, "no public policy opposes private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party." (*Tunkl*, *supra*, 60 Cal.2d at p. 101.) Ferguson and the City were equal bargaining partners who voluntarily and without any coercion agreed to enter into the Agreement. City officials, including the City Attorney, read and understood the liability disclaimer. The City could have demanded different terms concerning Ferguson's liability, and if Ferguson did not agree, the City could have chosen not to enter into the Agreement. Thus, the public policy concerns identified in *Tunkl* do not apply to invalidate the liability disclaimer in the Agreement.

In sum, none of the City's asserted grounds for attempting to invalidate the liability disclaimer apply here. Accordingly, we conclude that the trial court properly applied the

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[34] *Tunkl* pointed out that "[t]he admission room of a hospital contains no bargaining table where, *as in a private business transaction*, the parties can debate the terms of their contract." (*Tunkl*, *supra*, 60 Cal.2d at p. 102, italics added.) As the City characterizes the negotiations, the City's review of the Agreement "resulted in few revisions." However, that observation has no relevance here, as there is no evidence that the relatively few revisions requested by the City stemmed from any inequality in bargaining power.

liability disclaimer in the Agreement to modify the judgment to award only those damages found by the jury that related to the cost of the installation of the AMR system.

B. *The Trial Court Did Not Abuse Its Discretion in Denying the City's Motion for an Award of Attorney Fees Against Ferguson*

The City's final challenge is to the trial court's order denying the City's motion for an award of attorney fees against Ferguson.

The Agreement contains a provision stating that "[s]hould Seller pursue collections due to non-payment by Buyer, Buyer does hereby agree to reimburse Seller all costs of collection, including attorney fees." Based on this provision, the City brought a motion for an award of attorney fees pursuant to Civil Code section 1717.

As provided in Civil Code section 1717, "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." (Civ. Code, § 1717, subd. (a).) Under this provision, "when a party litigant prevails in an action on a contract . . . section 1717 permits the party's recovery of attorney fees whenever the opposing parties would have been entitled to attorney fees under the contract had they prevailed." (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 611.)

It is the role of the trial court to determine who is the prevailing party. (Civ. Code, § 1717, subd (b)(1) ["[t]he court, upon notice and motion by a party, shall determine who

is the party prevailing on the contract for purposes of this section"].) In making such a determination, "[t]he court may also determine that there is no party prevailing on the contract for purposes of this section." (Civ. Code, § 1717, subd. (b)(1).) "[I]n deciding whether there is a 'party prevailing on the contract,' the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources. The prevailing party determination is to be made only upon final resolution of the contract claims and only by 'a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions.' " (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 876 (*Hsu*).) "If neither party achieves a complete victory on all the contract claims, it is within the discretion of the trial court to determine . . . neither party prevailed sufficiently to justify an award of attorney fees." (*Scott Co. of California v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109.) "The prevailing party determination is to be made . . . by 'a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions.' " (*Hsu*, at p. 876.)

In this case, the trial court denied the City's motion for an award of attorney fees because it determined that there was no party prevailing on the contract. The trial court explained, "The results in this litigation as between [the City] and Ferguson is a mixed bag. [The City] sought the entire cost of [the] AMR System. . . . [The City] was only successful in recovering the installation costs from Ferguson." The trial court stated that "[t]here was no purely good news for either party. [The City] did not obtain the amount

it sought and Ferguson sought to avoid all contract damages." Accordingly, the trial court concluded "there is no prevailing party on the contract."

We apply an abuse of discretion standard of review. "The trial court exercises a particularly 'wide discretion' in determining who, if anyone, is the prevailing party for purposes of section 1717[, subdivision] (a). . . . To overturn that determination on appeal, the objecting party must demonstrate 'a clear abuse of discretion.' " (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 894, citation omitted.)

As we will explain, the trial court was within its discretion to determine that there was no party prevailing on the City's breach of contract cause of action against Ferguson. As expressed during its closing argument, the City's objective in its breach of contract cause of action against Ferguson was to establish that the liability disclaimer in the Agreement was not applicable, and that, accordingly Ferguson should be liable for the City's total damages associated with the AMR system, which it contended amounted to $3,892,839. Ferguson's approach, as stated in its closing argument was that while the jury might justifiably award damages for costs associated with the installation of the AMR system, the liability disclaimer precluded any other damages relating to Datamatic's products. The final judgment on the breach of contract cause of action was closer to the result advocated by Ferguson than by the City. Due to the applicability of the liability disclaimer in the Agreement, the City ended up recovering from Ferguson only $626,232.50 for damages associated with the installation of the AMR system.

" '[T]ypically, a determination of no prevailing party results when both parties seek relief, but neither prevails, *or when the ostensibly prevailing party receives only a part of the relief sought*.' " (*Hsu*, *supra*, 9 Cal.4th at p. 875, italics added.) Here, the trial court reasonably concluded that because the City received only a fraction of the relief that it sought in its breach of contract action against Ferguson, and it failed to establish that the liability disclaimer was inapplicable, it was not a prevailing party.

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

BENKE, Acting P. J.

GUERRERO, J.